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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NEW HAMPSHIRE INDEMNITY CO., Plaintiff and Appellant, v. PROFESSIONAL CLAIM SERVICES, INC., Defendant and Respondent.	D052106 (Super. Ct. No. GIC862737)

APPEAL from an order of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed and remanded for determination of attorney fees on appeal.

This is a companion case to *New Hampshire Indemnity Co. v. Professional Claim Services, Inc.* (Dec. 5, 2008, D051230 [nonpub. opn.]), in which we affirmed a defense summary judgment. New Hampshire Indemnity Co., doing business as AIG Specialty Auto (AIG) challenges a postjudgment order awarding Professional Claims Services, Inc. (PCS) contractual attorney fees as the prevailing party. We affirm the order and remand the matter for the trial court's determination of attorney fees on appeal.

BACKGROUND[1]

AIG writes automobile policies in California and Nevada. AIG hired PCS as an independent administrator of third party claims against AIG's insureds in those states. The parties' contracts required PCS to adjust claims promptly and in accordance with California and Nevada law and any unfair claims practices statutes, and authorized PCS to settle claims up to policy limits without AIG's prior approval.

The contracts also contained the following indemnity provision: "PCS agrees to indemnify, defend and hold [AIG] wholly harmless from and against any and all claims, including without limitation, attorney's fees and litigation expense arising or resulting from any alleged act, error or omission, including any intentional tort, willful misconduct, negligence or gross negligence by PCS . . . arising out of or in any way related to PCS' obligations under the terms of this Agreement."

In March 2006 AIG sued PCS for breach of written contract. The complaint alleged PCS mishandled four third party claims against AIG's insureds by not promptly investigating and settling them within the $15,000 policy limits, which ultimately resulted in three of the claimants' rejections of AIG's policy limits offers, the exposure of AIG to potential liability to its insured for breach of the implied covenant of good faith and fair dealing, and AIG's settlement of the three of the claims in excess of

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1 For convenience we repeat the procedural and factual statement from our opinion in the first appeal.

policy limits and the incurrence of defense costs in all four cases. The complaint alleged facts pertaining to each of the four claims, and prayed for $607,000 in damages plus $150,000 in defense costs.

PCS moved for summary judgment. Even though the complaint did not mention the indemnity clause, PCS argued it is inapplicable to AIG's voluntary settlement of third party claims made against its insureds. PCS presented evidence there was no bad faith litigation against AIG. PCS argued it "cannot defend or indemnify AIG if it [AIG] is never sued." PCS also argued AIG's losses were speculative as a matter of law.

In opposition to the motion, AIG cited California and Nevada law that an insurer may be liable to its insured for breaching the implied covenant of good faith and fair dealing by not reasonably settling a case and exposing its insured to a judgment in excess of policy limits. AIG presented evidence of its insureds' liability in the four underlying claims; of the nature of the claimants' injuries; of their $15,000 policy limits demands on PCS; that PCS did not accept the demands within designated deadlines; that the claimants filed lawsuits against the insureds, after which PCS referred the claims back to AIG; that AIG made policy limits offers three of the claimants' rejected, and that AIG then settled those matters by paying more than policy limits. Further, AIG incurred defense costs in all cases.

AIG argued that actual judgments in the underlying cases were not required to trigger the indemnity clause in its contracts with PCS. AIG characterized the third party lawsuits against its insureds as "claim[s] upon AIG" within the meaning of the indemnity clause.

On March 6, 2007, AIG filed a motion for leave to file a first amended complaint to add a cause of action for breach of an express indemnity agreement. On March 9, however, the court issued a tentative decision granting PCS's summary judgment motion on the grounds the indemnity clause is inapplicable to the third party claims against AIG's insureds, and its damages were speculative. At the hearing, both parties addressed the indemnity clause. The court took the matter under submission and later confirmed its tentative ruling. On April 25, 2007, judgment was entered for PCS.

PCS later moved for $62,324 in attorney fees under a provision of its contract with AIG. The court awarded the full amount to PCS as the prevailing party in the litigation. While the first appeal was pending, AIG filed a second appeal to challenge the attorney fees award. We rejected the parties' stipulation to consolidate the appeals for purposes of oral argument and opinion, but we scheduled both arguments for the same day. In our opinion in the first appeal, we affirm the summary judgment for PCS.

DISCUSSION

I

AIG contends that since the court erroneously granted PCS summary judgment, the attorney fees award must also fall. That contention is now moot.

Additionally, AIG contends PCS is judicially estopped from claiming fees because it denied the enforceability of the contract. Specifically, PCS successfully opposed AIG's motion to enforce the arbitration provision of the contract, and PCS moved for summary judgment on the ground the contract's indemnity clause was inapplicable. AIG asserts, "If PCS argues that [AIG] cannot bring a claim under the contract because [AIG] does

not have rights under the contract, then PCS is also estopped from seeking and recovering attorneys' fees pursuant to the unenforceable contract."

" ' "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary." ' [Citation.] The doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' " (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.)

We conclude the judicial estoppel doctrine is inapplicable here. Civil Code section 1717, subdivision (a) provides that in an action on a contract, the prevailing party is entitled to reasonable attorney fees whether or not he or she is the party the contract specifies as being entitled to fees. "The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610.) "To ensure mutuality of remedy . . . it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits a party's recovery of attorney fees whenever the opposing parties

would have been entitled to attorney fees under the contract had they prevailed." (*Id.* at p. 611.)

Accordingly, PCS's summary judgment motion was not inconsistent with its request for attorney fees. AIG prayed for attorney fees, and had it prevailed on the indemnity issue it would have been entitled to them.

Moreover, PCS's opposition to arbitration was not inconsistent with its attorney fees request. PCS resisted arbitration on numerous grounds, including that the contract's inclusion of an attorney fees clause showed the parties preserved their right to a court action, the arbitration clause was ambiguous and should be interpreted against AIG as the drafting party, and the clause constituted an adhesion contract. PCS also argued that the language of the arbitration clause did not apply to AIG's claims that PCS improperly handled claims, because that issue did not involve interpretation of the contract. The arbitration clause stated in part: "All disputes of differences arising out of the *interpretation of this Agreement* shall be submitted to the decision of two [a]rbitrators." (Italics added.) Contrary to AIG's position, none of PCS's arguments was a repudiation of the contract.

AIG also disputes the amount of the attorney fees award, asserting the court improperly included fees PCS incurred before AIG filed its complaint. To any extent the argument could have merit, AIG concedes it did not raise the argument at the trial court. Thus, AIG waived appellate review of the matter. (*Royster v. Montanez* (1982) 134 Cal.App.3d 362, 367.) " 'It is elementary that an appellate court is confined in its review to the proceedings which took place in the trial court. [Citation.] Accordingly, when a

matter was not tendered in the trial court, "It is improper to set [it] forth in briefs or oral argument, and [it] is outside the scope of review." [Citation.]' " (*Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1652.)

II

PCS seeks attorney fees on appeal. It is established that when a party is entitled to attorney fees, they are available for services at trial and on appeal. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) PCS is the prevailing party on appeal, and thus it is entitled to contractual attorney fees. "Although this court has the power to fix attorney fees on appeal, the better practice is to have the trial court determine such fees." (*Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 498.)

DISPOSITION

The order is affirmed and the matter is remanded to the trial court for its determination of an award to PCS of attorney fees on appeal. PCS is also entitled to costs on appeal.

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McCONNELL, P. J.

WE CONCUR:

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O'ROURKE, J.

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AARON, J.